Supreme Court, U.S.
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No. 09-800

# In The Supreme Court of the United States

NORTH COUNTY COMMUNITY ALLIANCE, INC.,

*Petitioner,*

v.

KEN SALAZAR, Secretary of the United States Department of the Interior; DEPARTMENT OF THE INTERIOR; GEORGE SKIBINE, Acting Chairman of the National Indian Gaming Commission; NATIONAL INDIAN GAMING COMMISSION,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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The National Indian Gaming Commission (NIGC) is a creature of the Indian Gaming Regulatory Act (IGRA),[1] and is the agency charged with the Act's administration. *See* 25 U.S.C. §§ 2704-06. In its response to the Alliance's petition, the government concedes that the NIGC's jurisdiction and IGRA's scope are "limited to the regulation of gaming on Indian lands." Br. for the Federal Resp'ts in Opp'n (Resp.) 9.[2] But this concession is largely empty, because the government also claims that the NIGC has the power to define the shape and contours of those limits. Specifically, while the government admits that the NIGC's jurisdiction is limited to Indian lands, it denies that the NIGC must determine that the gaming it approves and oversees falls within that jurisdiction. Instead, the government asserts that the NIGC may approve a tribal gaming ordinance without first determining whether a tribe's potential gaming sites constitute Indian lands.

This position is contrary to the fundamental logic of IGRA's regulatory scheme and this Court's administrative law jurisprudence. This Court has repeatedly held that an administrative agency may not act

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[1] Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701, *et seq.*).

[2] Similarly, the Ninth Circuit below noted that "[i]t is undisputed that IGRA authorizes tribal gaming only on 'Indian lands' as defined in [the Act]." Petitioner's Appendix (Pet. App.) 11.

beyond the limits of its statutorily prescribed jurisdiction. Here, IGRA's purposes, regulatory scheme, and underlying assumptions all necessarily imply that the NIGC must formally determine the Indian lands status of a tribe's potential gaming sites – and thereby establish its jurisdiction over such sites – prior to authorizing the tribe's gaming ordinance. To allow the NIGC to do otherwise is to allow it to unlawfully encroach on the proper province of state and local authorities – specifically, by preempting otherwise applicable state and local law without making any formal determination that such preemption is founded upon the valid assertion of the NIGC's jurisdiction. Given this, and the nationwide importance of the issues presented, this Court should grant the petition.

## ARGUMENT

1. As an initial matter, the government argues that this Court may be blocked from considering the merits of the Alliance's claims by the applicable statute of limitations. Resp. 11. The district court held that the Alliance's claims were barred by the statute of limitations, *see* Petitioner's Appendix (Pet. App.) 36-43, but the Ninth Circuit panel unanimously held otherwise, *see id.* at 6-9, 24.

The government provides no argument explaining why the statute of limitations issue warrants this Court's review, however. The Ninth Circuit's holding

did no more than correct the district court's error in applying the circuit's own statute of limitations jurisprudence. *See* Pet. App. 6-9 (discussing *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991)). The government does not explain how the Ninth Circuit's statute of limitations holding conflicts with the decisions of other circuits or this Court, nor does it otherwise demonstrate that the issue is of sufficient importance to warrant review. *Cf.* Sup. Ct. R. 10 (listing circumstances meriting this Court's review). Given this, and the conclusory nature of the government's contentions, *see Cone v. Bell*, 129 S. Ct. 1769, 1790 (2009) (Alito, J., concurring in part and dissenting in part),[3] the statute of limitations issue poses no obstacle to the consideration of the Alliance's claims.

2. Turning to the substance of the Alliance's claims, much of the government's response essentially argues that the NIGC need not determine the Indian lands status of a tribe's potential gaming sites prior to approving the tribe's gaming ordinance because IGRA contains no express directive on this point. Of course, such a directive is not required. Rather, in applying a statute the Court endeavors to effectuate Congress's intent by "looking to the provisions of the whole law, and to its object and policy." *John Hancock*

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[3] "[I]t is common to [sic] practice for appellate courts to refuse to consider issues that are mentioned only in passing."

*Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993).

Here, as explained in the Alliance's Petition and in Judge Gould's dissent below, *see* Petition (Pet.) 11-18 *and* Pet. App. 24-31, IGRA's purposes, regulatory scheme, and underlying assumptions all necessarily imply that the NIGC must formally determine the Indian lands status of a tribe's potential gaming sites – and thereby establish its jurisdiction over such sites – prior to authorizing the tribe's gaming ordinance. To read the statute otherwise is to invite the preemption of state and local gambling laws where Congress intended such laws to apply – a result that starkly contravenes this Court's case law. *See, e.g., City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424, 438 (2002) (noting presumption against preemption of state law concerning matters within states' historical police powers unless Congressional intent to the contrary is clear and manifest); *Owasso Indep't Sch. Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002) (Court will hesitate to interpret statute in a manner that would effect substantial change in the balance of federalism).

In response, the government asserts that it has ensured that the Nooksacks' gaming is limited to Indian lands in this case, because the Nooksacks' ordinance provides that all tribal gaming will occur on Indian lands. Resp. 9. The insufficiency of this approach is readily apparent. It appoints the fox to guard the hen house by allowing the tribe to determine the Indian lands status of a particular

parcel – an issue that is often unclear. *See infra* at 6. This is inadequate to support the assertion of NIGC jurisdiction in place of state law.

3. The government further claims that it would be "absurdly impractical" to determine the Indian lands status of a tribe's potential gaming sites prior to approving the tribe's gaming ordinance. Resp. 6. Yet the government concedes that the NIGC has recently promulgated regulations that allow it to compel tribes to divulge the information necessary to make such determinations. *See* Resp. 9 (citing Nat'l Indian Gaming Comm'n, *Facility License Standards*, 73 Fed. Reg. 6019 (2008)). These regulations authorize the NIGC chairman to request Indian lands information when a tribe submits a proposed gaming ordinance, 25 C.F.R. § 522.2(i), or at any time thereafter, 25 C.F.R. § 559.7. A tribe must also notify the NIGC that it is opening a new gaming facility at least 120 days prior to the opening of the facility, and the notice must contain information addressing the Indian lands status of the gaming site. 25 C.F.R. § 559.2.[4] The government's claims of impracticality are thus overstated and unsubstantiated, and should be ignored.

4. The government also claims that a tribe can request an Indian lands determination for a particular

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[4] These regulations stop short, however, of expressly requiring the NIGC to make formal Indian lands determinations for all potential tribal gaming sites.

parcel before proceeding with developing a casino. *See* Resp. 9. This is true, but it doesn't adequately answer the Alliance's claims.

The Alliance noted that a tribe could be economically devastated if it built a casino not located on Indian lands, and thus subject to often-stringent, sometimes-prohibitory state gambling laws – a concern that Judge Gould echoed in his dissent below. *See* Pet. App. 27-28. Indeed, the Indian lands status of a particular parcel is often unclear, especially where the parcel is located outside of the boundaries of a tribal reservation. *See* Pet. 3, 6 (discussing 25 U.S.C. § 2704(B), 25 C.F.R. § 502.12(b), and *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994)). Simply allowing a tribe to proceed with a casino development in the face of such uncertainty – whether because of the tribe's ignorance, aggressiveness, or something else – is, in the words of Judge Gould, "a disaster waiting to happen." Pet. App. 27. Such a course serves neither the tribes' interests nor the interests of the surrounding communities, and is not supported by the Act or federal Indian law generally. *Cf.* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 5.04[4], 5.05[2] (Nell Jessup Newton, *et al.*, eds. 2005) (discussing background and scope of federal government's trust responsibilities to tribes).

5. The government further asserts that even if some gaming does occur on non-Indian lands, this is an enforcement issue to be dealt with at the NIGC's discretion. Thus, the argument goes, the Alliance's claims are nothing more than an impermissible

attempt to compel the NIGC to exercise its enforcement powers.

This argument entirely misses the point. While it is highly questionable whether the NIGC has any enforcement authority over tribal gaming on non-Indian lands – such gaming is, after all, outside of the NIGC's jurisdiction,[5] *see* Resp. 9 and *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp. 2d 295, 324 (W.D.N.Y. 2007)[6] – the Alliance is not asking the NIGC to bring an enforcement action. Rather, the Alliance is seeking an order demanding the NIGC to establish its jurisdiction over the

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[5] The government claims that the NIGC has such authority pursuant to 25 U.S.C. § 2713. *See* Resp. 8. But, despite the government's insistence, nothing in this statute purports to extend the NIGC's enforcement powers to non-Indian lands. Indeed, as noted above, the NIGC has conceded that its jurisdiction and IGRA's scope are "limited to the regulation of gaming on Indian lands." Resp. 9.

The government also points to a regulation that purports to extend the NIGC's enforcement powers to non-Indian lands. *See* Resp. 8 (citing *Amendments to Various National Indian Gaming Commission Regulations*, 74 Fed. Reg. 36,940 (2009) (to be codified at 25 C.F.R. § 573.6(a)(13)). But, given the absence of any statutory authority for such a regulation, it is of questionable force or validity.

[6] "Because the NIGC's jurisdiction is limited to oversight of gaming on Indian lands, its civil enforcement powers can not extend to gaming on non-Indian lands. This jurisdictional limitation is reflected in the NIGC's own regulations, which provide for closure orders and fines in a number of circumstances involving violations of the IGRA. . . . Conspicuously absent from the NIGC's own list is any reference to enforcement relative to the conduct of Indian gaming on non-Indian lands."

Northwood Crossing Casino by determining whether the casino is located on Indian lands.

6. Finally, the Alliance notes that the government does not dispute the importance of the questions presented. As explained in greater detail in the Alliance's petition, there are currently over 500 Indian tribes that operate over 450 gaming operations in twenty-nine states. *See* Pet. 8-9. These operations generate over $26 billion in revenue annually. *Id.*

In enacting IGRA, Congress sought to balance federal, tribal, and local rights and interests concerning these activities. The Ninth Circuit's decision, if allowed to stand, shatters this balance. The decision increases the likelihood that tribal gaming will occur on non-Indian land while cloaked with the imprimatur of a tribal gaming ordinance approved by the NIGC – an approval that effectively, but improperly, preempts the state and local gambling laws that Congress intended to govern gaming on non-Indian lands.

## CONCLUSION

For the reasons stated above, and in the Alliance's petition for a writ of certiorari, the petition should be granted and the decision of the Ninth Circuit should be reversed.

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Respectfully submitted,

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